No. 14410

In the United States Court of Appeals for the Ninth Circuit

ERWIN P. WERNER, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

BRIEF FOR THE UNITED STATES, APPELLEE

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CITATIONS

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OPINION BELOW

The district court's opinion (R. 37–44) is reported at 119 F. Supp. 894.

JURISDICTION

The district court's jurisdiction rested on 28 U. S. C., sec. 1346 (a). Judgment was entered on March 17, 1954 (R. 48–49). Notice of appeal was filed on April 9, 1954 (R. 50). The jurisdiction of this Court is invoked under 28 U. S. C., sec. 1291.

PRESIDENTIAL PROCLAMATIONS INVOLVED[1]

So far as material, the Proclamation (No. 2487) of May 27, 1941, 55 Stat. 1647, declares:

[1] Section 3 of the Joint Resolution approved July 25, 1947, 66 Stat. 451, is set out in the Argument at p. 6, *infra*.

> NOW, THEREFORE, I, FRANKLIN D. ROOSEVELT, President of the United States of America, do proclaim that an unlimited national emergency confronts this country, which requires that its military, naval, air and civilian defenses be put on the basis of readiness to repel any and all acts or threats of aggression directed toward any part of the Western Hemisphere.

So far as material, the Proclamation (No. 2973) of April 8, 1952, 66 Stat. C31, declares (C32):

> NOW, THEREFORE, I, HARRY S. TRUMAN, President of the United States of America, do proclaim that the national emergencies declared to exist by the proclamations of September 8, 1939, and May 27, 1941, terminated this day upon the entry into force of the Treaty of Peace with Japan.

QUESTION PRESENTED

Whether, when the terms of a lease provide that it is to terminate six months "from the date of the termination of the unlimited National Emergency, as declared by the President * * * on May 27, 1941," it continues until six months after a subsequent Proclamation of the President declaring the termination of the national emergency proclaimed on May 27, 1941, notwithstanding his earlier approval of a Joint Resolution of Congress terminating authority for new acquisitions under Acts of Congress which are in effect only during periods of war or national emergency.

STATEMENT

On February 1, 1943, Mark L. Herron and his wife leased to the United States about 40 acres of land for

$25 a year (R. 13–20; see also R. 20–22). The lease was to terminate six months "from the date of the termination of the unlimited National Emergency, as declared by the President * * * on May 27, 1941 (Proclamation 2487)" (R. 15, 22).

On May 17, 1948, appellant became owner of the leased property and on July 23, 1951, filed this suit (R. 3–32).[2] He alleged that the unlimited national emergency proclaimed on May 27, 1941, had ended by virtue of a series of events (R. 6–11), that consequently the lease terminated "between May 7, 1948, and December 6, 1950" (R. 12), and that he was entitled to $10,000 for the Government's subsequent use of the land (R. 12–13).

After this Court reversed the trial court for dismissing the complaint on the ground of *res adjudicata, Werner* v. *United States,* 198 F. 2d 882 (1952), the United States answered (R. 33–37) that the President's Proclamation (No. 2974) of April 28, 1952, 66 Stat. C31, declared the termination of the emergency proclaimed on May 27, 1941. The trial court so held (R. 37–44) and appropriate findings of fact and conclusions of law were filed (R. 44–47).[3] Ac-

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[2] In a prior suit, the appellant attempted to obtain reformation of the lease here involved to recover for the alleged reasonable value of the use and occupancy of the premises since August 14, 1945, upon which date he alleged the lease terminated. The district court found that that action was barred by the statute of limitations and dismissed the suit for want of jurisdiction over the United States. This Court affirmed. *Werner* v. *United States*, 188 F. 2d 266 (1951).

[3] At the hearing appellant did not attempt to prove any basis for the allegations contained in his amended complaint to show the national emergency had been brought to an end but, instead, con-

cordingly, judgment was entered awarding appellant $183.15, the rent due from June 30, 1945, to October 28, 1952, six months after termination of that emergency (R. 48–49). (This rent had previously been tendered by the United States and refused by appellant (R. 46–47).)

ARGUMENT

The district court correctly held that there was a valid and subsisting lease until October 28, 1952

By express provision of the lease in question, the termination of the unlimited emergency as declared by the President on May 27, 1941, determines the termination of the lease (R. 15, 22). The emergency so proclaimed by the 1941 proclamation was terminated by Proclamation 2974 of April 28, 1952, and thus the lease under its terms expired October 28, 1952. That the national emergency did not terminate, for purposes such as are here involved, until April 28, 1952, has been judicially determined. *American Houses* v. *Schneider,* 211 F. 2d 881, 884 (C. A. 3, 1954). See also 40 Op. A. G. 421, 423 (1945). In the *American Houses* case, with reference to what a 1943 lease described as "the present national emergency," the court stated (211 F. 2d at p. 884): "* * * we are satisfied that the court correctly concluded that 'the present national emergency' described in the lease is to be treated as expiring on April 29, 1952, by virtue of Presidential Proclamation No. 2974, issued the preceding day."

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tended the national emergency was terminated by the Joint Resolution of Congress dated July 25, 1947, 61 Stat. 449, 451 (R. 39–40).

Appellant's sole contention is that the emergency announced on May 27, 1941, terminated on July 25, 1947.[4] This contention is based on section 3 of the Joint Resolution, 61 Stat. 451, approved that day by the President. Appellant's argument seems to be that the lease was negotiated pursuant to the Act of July 2, 1917, 40 Stat. 241, as amended, 50 U. S. C., sec. 171, a statute enumerated in the Joint Resolution, and that in consequence the emergency proclaimed on May 27, 1941, *and* the lease were terminated by approval of the Joint Resolution.

The contention is frivolous. Appellant cites no authority and offers no argument, save mere assertion, for its proposition that the lease in question must be taken as authorized only by 50 U. S. C., sec. 171. That contention, if accepted, would be applicable to every lease which did not in terms state that it was negotiated pursuant to some authority, other than section 171. Congress could hardly have intended such a result, since Congress has by legislation subsequent to the 1947 Joint Resolution recognized the continu-

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[4] While this Court held in No. 13167 (*Werner* v. *United States*, 198 F. 2d 882, 883 (1952)) that its earlier holding in No. 12612 (*Werner* v. *United States*, 188 F. 2d 266, 267 (1951)) that "There has been no 'termination of the unlimited national emergency' declared by President Roosevelt on May 27, 1941, by Proclamation 2487" was not "res judicata (perhaps more properly estoppel by judgment)" of the instant action, it is submitted that under the doctrine of *Chicot County Dist.* v. *Bank*, 308 U. S. 371, 378 (1940), so far as appellant's present sole argument is concerned, i. e., that the Joint Resolution of Congress dated July 25, 1947, 61 Stat. 449, had the effect of terminating the lease in question, the judgment of this Court in No. 12612, *supra*, must properly be considered *res judicata*.

ance of the emergency for such purposes as the Government acquired its lease in this case, and has continued to extend the life of the legislation authorizing such contracts.[5]

Moreover, appellant's apparent position in any event rests upon a complete misconception of the purpose, meaning, and effect of section 3 of the Joint Resolution.

Section 3 provides that:

> *In the interpretation of the following statutory provisions,* the date when this joint resolution becomes effective shall be deemed to be the date of the termination of any state of war heretofore declared by the Congress and of the national emergencies proclaimed by the President on September 8, 1939, and on May 27, 1941.[6]

Among "the following statutory provisions" is the Act of July 2, 1917, 40 Stat. 241, as amended, 50 U. S. C., sec. 171. That Act contains a proviso, 40 Stat. 241:

> That *when such property is acquired in time of war, or the imminence thereof,* upon the filing of the petition for the condemnation of

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[5] Thus, as the trial court found (Fdg. 6, R. 47), at all times here involved prior to April 28, 1952, there was valid statutory authority for leasing the property other than 50 U. S. C., sec. 171. Under the provisions of section 1 (a) of the Act of July 2, 1940, c. 508, 54 Stat. 712, 50 U. S. C. Appendix, sec. 1171, the Secretary of War, now the Secretary of the Army, was expressly authorized to provide for the storage of munitions and supplies and to enter into contracts for those and other military purposes. That section was in effect throughout the period involved. Act of April 14, 1952, c. 204, 66 Stat. 54, 55; Act of July 3, 1952, c. 570, 66 Stat. 330, 331; Act of March 31, 1953, c. 13, 67 Stat. 18; Act of June 30, 1953, c. 172, 67 Stat. 131, 132.

[6] All emphasis has been supplied.

> any land, temporary use thereof or other interest therein or right pertaining thereto to be acquired for any of the purposes aforesaid, immediate possession thereof may be taken to the extent of the interest to be acquired and the lands may be occupied and used for military purposes, and the provision of section three hundred and fifty-five of the Revised Statutes, providing that no public money shall be expended upon such land until the written opinion of the Attorney General shall be had in favor of the validity of the title, nor until the consent of the legislature of the State in which the land is located has been given, shall be, and the same are hereby, suspended during the period of the existing emergency.

In short, section 3 of the Joint Resolution prohibited use of the procedures set out in the proviso of the Act of July 2, 1917, after July 25, 1947, the date on which it became effective. In fact, it has been expressly held in a somewhat similiar situation, in which the Court rejected the proposition asserted here, that by that Joint Resolution Congress "was not terminating the national emergency as defined in leases or condemnation petitions by which the land on which the projects were located were acquired * * *." *United States* v. *Certain Parcels of Land, Etc.,* 102 F. Supp. 691, 695 (W. D. Pa. 1952).

While it is believed that the foregoing makes resort to legislative history unnecessary, those materials support the view that section 3 of the Joint Resolution of July 25, 1947, suspended the enumerated statutes as to further acquisitions thereunder and had no

reference to the termination of interests theretofore validly acquired. U. S. Code Congressional Service, 80th Congress, First Session, 1947, pp. 1360–1361, 1368. As shown at the last cited page, the Senate Report recognized that the Joint Resolution simply suspended the statute in question. Thus the Committee said (*Ibid.*, p. 1368):

> 31. Authority to take immediate possession of land needed for military purposes at the commencement of condemnation proceedings "in time of war or the imminence thereof."
>
> July 2, 1917 (40 Stat. 241, ch. 35), extended April 11, 1918 (40 Stat. 518, ch. 51), to nitrate plants, etc.; and July 9, 1918 (40 Stat. 888), to timber, etc.
>
> Terminated. The authority under this statute is lapsed by the resolution, but the statute remains as permanent legislation.

In further confirmation of the purpose of section 3 is the statement made by the President on the occasion of his approval of the Joint Resolution. He said: "The emergencies declared by the President on September 8, 1939, and May 27, 1941, and the state of war continue to exist, however, and it is not possible at this time to provide for terminating all war and emergency power." See *Woods* v. *Miller Co.*, 333 U. S. at p. 140, fn. 3. Moreover, in the Act of April 14, 1952, 66 Stat. 54, extending the life of 50 U. S. C., sec. 1171 (see fn. 5, p. 6, *supra*), Congress spoke of the "termination hereafter" of the national emergency declared by the Proclamation of May 27,

1941. This was years after appellant claims the emergency had ended.[7]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the district court should be affirmed.

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DECEMBER 1954.

[7] It is unnecessary to deal with appellant's argument (Br. 20–23) that the trial court erred in holding that only the President could terminate the emergency. Since Congress did not by the Joint Resolution of 1947 terminate the emergency, the *result* reached by the trial court is correct and should not be disturbed even if the court's reasoning be assumed to be imperfect. E. g., *Brown* v. *Allen*, 344 U. S. 443, 459 (1953).

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